

Surveillance: Legal and Ethical Considerations For Private Investigators

The recent State Services Commission Inquiry report into the use of external security consultants by government agencies, writes David Horsburgh CPP PSP PCI, raises the need to debate our industry's legal and ethical use of intrusive surveillance techniques.

The release of the State Services Commission's report into private investigation company Thompson and Clark has signalled a need for the security industry to re-evaluate both legal and ethical implications in the use of surveillance technologies.

The challenges facing the New Zealand private security sector are far broader than the issues highlighted by the State Services Commission Inquiry and blame for reputational damage to our industry cannot be laid solely at the feet of Thompson and Clark.

The SSC Inquiry was initially driven by publicity around Southern Response Earthquake Services Ltd's engagement of Thompson and Clark Investigations Ltd to conduct surveillance of individual insurance claimants. Southern Response is a government-owned company and as such is bound by the State Services Commission Code of Conduct.

After the Inquiry was announced, further questions arose regarding Thompson and Clark's relationships with other government agencies, including the Ministry of Business, Innovation and Employment, the Ministry for Primary Industries and the New Zealand Security Intelligence Service. The Inquiry was expanded to finally include 131 government agencies and subsidiaries.

The Inquiry found that Southern Response, the Ministry of Agriculture and Forestry, the Ministry of Business Innovation and Employment, Crown Law, the Ministry of Social Development, the New Zealand Transport Authority, and the New Zealand Security Intelligence Service

all breached the State Services Code of Conduct when conducting business with New Zealand private investigation and security consultancy companies.

A key issue addressed by the SSC Inquiry was the use of surveillance technologies by Thompson and Clark. The Inquiry defined the term 'surveillance activities' and 'surveillance' to include 'any close observation of people, places, things or information, with or without the use of devices'.

The Inquiry described the term as including following or tracking people in public or private places and suggested that it could extend to social media monitoring using assumed identities that interfered with a reasonable expectation of privacy. This is arguably a fair meaning of the term surveillance.

The SSC Inquiry found that an unlicensed private investigator, contracted to Thompson and Clark, undertook covert audio recordings in closed meetings involving Southern Response claimants. The Inquiry disagreed with the Thompson and Clark argument that covert attendance at claimant meetings and conducting audio recordings of claimants was not surveillance.

In its reports to various government agencies, Thompson and Clark referred to 'issue motivated groups' which were reported as including Save Animals From Exploitation, Oil Free Otago, Climate Justice Taranaki, Farmwatch, the Green Party, the Mana Movement, various iwi and Greenpeace. The SSC Inquiry was highly critical of government agencies designing their enforcement functions based on the construct of 'issue motivated groups'.

The Inquiry found that Thompson and Clark conducted large-scale surveillance operations against Greenpeace, involving close observation, extensive searches of the Motor Vehicle Register and access to other databases including the Driver Licence Register. The report implied that Thompson and Clark considered surveillance and analysis of 'issue motivated groups' was justified on the grounds that those groups posed threats to the safety and security of their client organisations.

The Inquiry formed the view that activities such as electronic surveillance of individuals, covert surveillance of groups, attending meetings using false identities, and involvement in activity that conflicts with human rights may breach the SSC Code of Conduct and potentially contravene the provisions



State Services Commissioner Peter Hughes
Image: State Services Commission / Twitter

enshrined in the New Zealand Bill of Rights Act 1990 (NZBoR) including freedom of expression, freedom of association and freedom from discrimination.

An important view expressed by the Inquiry was that legal requirements applying to Crown agencies apply equally to activities carried out by contractors working for government agencies. That means private security consultants and investigators contracted to government agencies become bound by the SSC Code of Conduct and the NZBoR.

In 2017 the Ministry of Business, Innovation and Employment created an 'All of Government' sub-panel to facilitate the private security sector delivering Protective Security Consultancy Services to government agencies. Thompson and Clark were part of the sub-panel.

Key requirements within the sub-panel agreement include:

- (a) Services must be provided in accordance with industry best practice.
- (b) Providers must act in the best interests of the participating agency.
- (c) Providers must comply with all privacy and other policies and guidelines issued by the participating agency, including the State Services Code of Conduct.
- (d) Providers must obtain, maintain and comply with any governmental, regulatory or other relevant approvals, permissions or requirements.
- (e) Providers must comply with all laws relevant to the provision of services.
- (f) Providers must use all reasonable endeavours to avoid damaging or adversely affecting the reputation of the participating agency.



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So, what are the consequences to our industry from the SSC Inquiry? The Inquiry report should not be examined in isolation but rather the debate needs to be about our industry's legal and ethical use of highly intrusive surveillance devices and techniques that intrude unreasonably into the privacy of individuals.

The Principles contained in the *Privacy Act 1993* require that personal information collection:

- (a) Must be for a lawful purpose.
- (b) Must be necessary.
- (c) Must not be collected unfairly.
- (d) Must not intrude to an unreasonable extent upon the personal affairs of the individual concerned.

However, a review of the private security industry requires an analysis broader than an examination of the Privacy Act principles. The Private Investigators and Security Guards Act 1974 placed restrictions on the use of imaging and audio recording devices by private investigators. Those restrictions were a response to reports of unethical behaviour by private investigators involved in divorce investigations.

The Private Security Personnel and Private Investigators' Bill of 2010 originally contained the imaging and audio recording restrictions from the 1974 Act. However during the passage of the Bill through the House in 2010, those restrictions



were removed. The removal met strong opposition from various parliamentarians, as recorded in Hansard, during the second reading of the Bill on 7 September 2010 and at a subsequent hearing of the Justice and Electoral Committee. Some key excerpts from Hansard include:

- (a) "There is good reason why there should be protections around the way that the industry operates when it comes to an individual's privacy." (Rt Hon Jacinda Ardern).
- (b) "I do not think they should have carte blanche to use [digital devices such as cameras, voice recorders and so on] in any way that they see fit, which is effectively what this bill allows them to do." (Hon Chris Hipkins).
- (c) "Now that we see private investigators using [surveillance] technology and being so intrusive into the lives of others, it is appropriate that they be properly restrained." (Keith Locke).
- (d) "When discussing the expansion of technology that intrudes on our privacy we have to consider carefully how it might be applied by private investigators and the like in our society today." (Keith Locke).
- (e) "The select committee held divergent views on this topic and although a number of people argued that the original restriction would inhibit the work of private investigators, and that the public interest in investigating criminal activity outweighed public privacy, a number of people argued that



- the clause should be retained to avoid potential abuse and unfairness." (Hon Iain Lees-Galloway).
- (f) "It is important to be mindful that not all of the work that this provision covered would have been investigation around criminal activity. In fact, probably some of the more frequent activity might have simply related to, for instance, marital disputes ..." (Rt Hon Jacinda Ardern).
 - (g) "Our privacy is under threat as never before because of the reach of digital technology, and who is leading that invasion? It is the private spies, often private corporate spies, who engage in industrial espionage and in the invasion of private rights that is pushing the boundary." (Hon David Cunliffe).
 - (h) "We need to protect New Zealanders' privacy. We need to protect them from sophisticated private individuals not covered by the restraints that apply to the State, who have access to advanced technology and can access information about other individuals in unprecedented ways." (Hon David Cunliffe).
- Since the removal of the restriction placed on private investigators' use of imaging and audio recording devices, investigators have seized the opportunity to engage in the use of intrusive technologies to levels even greater than opponents had feared.

For example in the field of 'infidelity investigations' research has identified some New Zealand licensed private investigators marketing surveillance, GPS vehicle tracking, computer forensics, phone data recovery and covert cameras to investigate suspicions that a husband, wife or partner is 'cheating'.

Some such companies are openly marketing 'Honey Trap' services, claiming use of 'male and female investigators of all ages, interests, looks and levels of education, equipped with the latest video, voice and visual recording devices', to test whether a husband or wife might be open to an extramarital affair. Investigators are described as 'all former police detectives and the surveillance teams staffed with former military Special Forces and Police specialists'.

Another company describes their 'Honey Trap' service in the following terms: 'If you want to know the honesty and integrity of your partner, a honey trap will present them with an opportunity that they can choose to accept or reject. All conversations are recorded and include video evidence.'

The use of 'Honey Traps' may well be a breach of Privacy Act Principles 4(b) (i) and (ii), in that personal information is being obtained both by unfair means and by means that unreasonably intrude into the privacy of the individual. It may also reach the threshold of the tort, intrusion into seclusion, as described in *C v Holland* [2012] NZHC 2155. These types of investigations call into question the ethics of the private investigation industry.

The release of the State Services Commission Inquiry Report into the Use of External Security Consultants by Government Agencies provides the security industry, and in particular the private investigation sector, an incentive to examine both the legal and ethical aspects of how their businesses are conducted. A failure to do so may result in a re-introduction of the 1974 restrictions on private investigator use of imaging and audio recording technologies.

Sources

1. <http://www.ssc.govt.nz/sites/all/files/Report%20of%20the%20inquiry%20into%20the%20use%20of%20external%20security%20consultants%20by%20government%20agencies.pdf>
2. <https://www.parliament.nz/en/pb/hansard-debates/rhr/>



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